BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NANCY J. CUMMINGS	)	
Claimant	)	
VS.	)	
	)	Docket No. 211,637
KAYLOR DENTAL LABORATORY, INC.	)	
Respondent	)	
AND	)	
	)	
BERKLEY ADMINISTRATORS	)	
Insurance Carrier	)	

ORDER

Claimant appealed the Award dated November 17, 1997, entered by Administrative Law Judge John D. Clark. The Appeals Board heard oral argument in Wichita, Kansas, on May 8, 1998.

APPEARANCES

Robert L. Nicklin appeared for the claimant. Kirby A. Vernon appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

In this proceeding claimant alleged she reinjured both hands and wrists from February 1996 through August 8, 1996. After finding that claimant did not attempt to perform the accommodated job respondent offered, the Administrative Law Judge denied her request for a work disability. The Judge also deducted a preexisting 12 percent whole body functional impairment rating from claimant's ultimate 17 percent rating and awarded claimant benefits for a 5 percent permanent partial general disability.

Claimant appealed and contends the Administrative Law Judge erred by applying the principles set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), to limit her benefits to the amount her functional impairment rating increased. At oral argument before the Appeals Board, the respondent and its insurance carrier raised as an issue whether Dr. Murati's deposition should be considered part of the evidentiary record because they had earlier objected to extending claimant's terminal date to take that deposition.

The only issues now before the Appeals Board are:

(1) Is Dr. Murati's deposition part of the evidentiary record? Claimant contends the Administrative Law Judge properly exercised his discretion in extending her terminal date. The respondent and its insurance carrier contend the Judge did not.

(2) What is the nature and extent of claimant's injury and disability? Claimant contends she was not required to attempt to perform the job the respondent offered her in November 1996 because she believed both that she would be required to violate her medical restrictions and that she could not perform the job. Conversely, the respondent and its insurance carrier argue claimant's refusal to attempt to perform the accommodated job was not justified and, therefore, claimant's refusal to attempt to perform the accommodated job limits her to an award based upon her functional impairment rating only.

FINDINGS OF FACT

After considering the entire record, the Appeals Board finds as follows:

(1) In 1994 the claimant, Nancy J. Cummings, developed bilateral carpal tunnel syndrome and received treatment from board-certified orthopedic surgeon Tyrone Artz, M.D. Dr. Artz operated on both Ms. Cummings' wrists. In December 1994, the doctor released Ms. Cummings to return to work with the respondent, Kaylor Dental Laboratory, Inc., with the recommendation that she limit repetitive activities to one-third of the day. At that time the doctor believed she had a 10 percent permanent functional impairment to each upper extremity, which converted to a 12 percent whole body functional impairment.

(2) In late 1994 and early 1995, Ms. Cummings had increased hand and wrist symptoms. In February 1995 she returned to Dr. Artz who then gave her additional medical restrictions that she avoid vibratory tools and grinding activities.

(3) On April 9, 1996, Ms. Cummings again returned to Dr. Artz with complaints of increased symptoms in her hands and wrists. The doctor added to her medical restrictions

that she avoid vibratory tools, mixing, sawing, and grinding. In response, Kaylor Dental placed Ms. Cummings in a job performing janitorial and maintenance work.

(4) On April 15, 1996, Ms. Cummings again returned to Dr. Artz with bilateral hand complaints. Dr. Artz supplemented his medical restrictions and added that she limit her lifting to ten pounds and perform no weed eating, window washing, pushing, pulling, grasping, repetitive movements, or twisting or turning with her hands.

(5) In response to the newest restrictions, the dental lab placed Ms. Cummings in a job delivering samples. When it was determined she could not perform long distance driving to out-of-town dental offices, the dental lab gave Ms. Cummings the job of delivering samples to local dental offices from 8 a.m. until approximately 3 p.m. and then wrapping and boxing cases for the last two hours of the day.

(6) Because of her continued symptoms and positive EMG and nerve conduction studies, in late July 1996 Dr. Artz offered additional surgery, which Ms. Cummings ultimately declined. Shortly afterwards, Ms. Cummings terminated her job with the dental lab because she felt she could not continue to perform it. Her last day of employment with the dental lab was on or about August 8, 1996.

(7) In November 1996, the dental lab offered Ms. Cummings her former delivery job but with an additional accommodation that she would be provided a car with both power steering and an automatic transmission. After discussing the proposed job with Dr. Artz, Ms. Cummings declined the offer without attempting to perform the job. Although the dental lab represented that her duties would not violate her medical restrictions, Ms. Cummings believed otherwise and did not believe she could successfully perform the job.

(8) When she testified in December 1996, Ms. Cummings was unemployed and looking for work. Before she terminated her job with the dental lab, she was earning 90 percent or more of the $377.24 that the parties stipulated she was earning for this alleged period of accident, February 1996 through August 8, 1996.

(9) It is unclear whether Dr. Artz believes claimant has sustained a 5 percent or 10 percent increase in functional impairment to the body as a whole as a result of the recurrent bilateral carpal tunnel syndrome. In his letter to Mr. Nicklin dated September 13, 1996, the doctor wrote that Ms. Cummings' whole body functional impairment is now 17 percent, which is only 5 percent greater than the 12 percent impairment rating he found in 1994. But the doctor testified at his November 1996 deposition that Ms. Cummings' whole body functional impairment increased approximately 10 percent as a result of the recurrent carpal tunnel syndrome.

(10) Dr. Artz's testimony is neither consistent nor clear. Nevertheless, he appears to believe Ms. Cummings could probably perform the driving job the dental lab offered but that the only way to really know was for her to try.

CONCLUSIONS OF LAW

The Award should be affirmed.

(1) The deposition of Pedro A. Murati, M.D., taken on May 19, 1997, is part of the evidentiary record to be considered for purposes of final award.

The administrative law judges may extend terminal dates under K.S.A. 44-523(b) on application for good cause shown. The Judge found good cause and the Appeals Board agrees. Ms. Cummings encountered scheduling problems and the Judge extended both her and the respondent's terminal dates.

The administrative law judges should not be bound by technical rules of procedure. Rather, the Legislature intended (1) the parties to have a reasonable opportunity to be heard and to present their evidence and (2) fair and expeditious hearings. K.S.A. 44-523(a). Further, the administrative law judges should be given wide leeway in controlling their dockets and insuring the parties' rights to a fair hearing.

(2) Because hers is an "unscheduled" injury, Ms. Cummings' right to permanent partial disability benefits is governed by K.S.A. 1996 Supp. 44-510e:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The above-quoted statute, however, must be read in light of Foulk and Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that paid a comparable wage. In Copeland, the Court held that a worker must make a good faith effort to find an appropriate job after recovering from an injury or a post-injury wage based upon wage-earning ability would be imputed for the wage loss prong of the permanent partial general disability formula.

Here, the Foulk and Copeland cases are controlling. Although she was not working elsewhere, Ms. Cummings did not attempt to perform the accommodated driving job that the dental lab offered. As Dr. Artz indicated, Ms. Cummings could probably perform that job but the only way to know for certain was for her to try it. But she did not. The fact that the dental lab had attempted to provide Ms. Cummings other accommodated positions, which happened to aggravate her condition, is not evidence that the dental lab acted in bad faith and does not excuse her from attempting to perform the newly offered position.

The parties did not dispute the Administrative Law Judge's finding that Ms. Cummings sustained an additional 5 percent whole body functional impairment as the result of the injury in question. Therefore, the Appeals Board adopts the Judge's finding and conclusion that Ms. Cummings now has a 17 percent whole body functional impairment due to her upper extremity injuries, which is 5 percent more than her preexisting 12 percent whole body functional impairment. Under K.S.A. 1996 Supp. 44-501(c), Ms. Cummings is entitled to an award for a 5 percent permanent partial general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated November 17, 1997, entered by Administrative Law Judge John D. Clark should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert L. Nicklin, Wichita, KS
Kirby A. Vernon, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director